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ON

*March 13, 2006*

*Mark B. Quatt*

Mark B. Quatt Registration No. 30,484

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: Vadhar et al.

Docket No: 43489-01

Serial No.: 10/051,584

Examiner: Madsen, Robert A.

Filing Date: January 18, 2002

Group Art Unit: 1761

Title: Self Venting Peelable Microwaveable Vacuum Skin Package

APPEAL BRIEF

Commissioner for Patents  
Alexandria, VA 22313-1450

Dear Sir:

This Appeal Brief is being filed in support of a Notice of Appeal filed on January 9, 2006.

The Commissioner is authorized to charge the fee of \$500 for filing an appeal Brief, to Deposit Account No. 07-1765.

The Commissioner is authorized to charge any additional fees that may be required or credit any overpayment to Deposit Account No. 07-1765.

A Petition for a one (1) month extension of time is enclosed.

Respectfully submitted,

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*3-13-06*

date

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**Real Party in Interest**

The real party in interest in this patent application is Cryovac, Inc.

**Related Appeals and Interferences**

There are no other appeals or interferences known to appellants, the appellants' legal representative, or assignee that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

### **Status of Claims**

The claims now on appeal are claims 23, and 25 to 29.

Claims 1 to 20 were rejected in an Office Action dated March 29, 2004.

By amendment of September 2, 2005, claims 6 and 16 were amended, claims 1 to 5, and 11 to 15 were canceled, and claims 21 and 22 were added.

Claims 6 to 10, and 16 to 22 were rejected in the Final Office Action dated September 22, 2004.

An RCE was filed on December 23, 2004, along with an amendment in which claims 6 to 9, 16, 18 and 19 were amended, and claims 23 and 24 were added.

Claims 6 to 10, and 16 to 24 were rejected in the Office Action dated March 10, 2005.

By amendment of June 10, 2005, claims 6 and 16 were amended, claims 1 to 22, and 24 were canceled, claim 23 was amended, and claims 25 to 29 were added.

Claims 23, and 25 to 29 were rejected in the Final Office Action dated August 26, 2005.

Appellants thereafter filed a Notice of Appeal on January 9, 2006.

A copy of the claims presently on appeal appears in the Claims Appendix.

**Status of Amendments**

The claims now on appeal are claims 23, and 25 to 29.

These are the same claims that were rejected in the Final Office Action dated August 26, 2005.

No amendments since that Office Action have been sought or entered.

A copy of the claims presently on appeal appears in the Claims Appendix.

**Summary of Claimed Subject Matter****Concise Explanation of the subject matter of independent claim 23**

A microwaveable vacuum skin package (10) comprises

a support member (20) having an upper surface and a lower surface (page 4, lines 1 to 2; page 7, lines 10 to 18);

a bottom web (30) having an upper surface and a lower surface, the lower surface of the bottom web (30) being adhered to the upper surface of the support member (20) (page 4, lines 2 to 4; page 8, line 10 to page 9, line 5);

a food product (40) disposed on the upper surface of the bottom web (30) (page 4, line 4); and

a top web (50) disposed on the food product (40) (page 11, line 5; page 12, line 4);

wherein the top web (50) of the vacuum skin package (10) is draped over the food product (40), by a vacuum skin packaging process, such that the top web (50) substantially conforms to the shape of the food product (40) and a vacuum skin package is thereby produced (page 1, lines 23 to 24; page 4, lines 5 to 7; page 6, line 24 to page 7, line 7; and page 12, lines 9 to 13);

wherein the top web (50) of the vacuum skin package (10) is sealed at its lower surface to the upper surface of the bottom web (30) to form a seal at a location outside the periphery of the food product (40) (page 4, lines 7 to 8; and page 12, lines 14 to 16);

wherein the top web (50) of the vacuum skin package (10) comprises a sealant layer comprising an ethylene/alpha olefin copolymer (page 4, lines 9 to 10; and page 12, lines 14 to 17); and

wherein the bottom web (30) of the vacuum skin package (10) comprises a sealant layer consisting essentially of a blend of

- i) between 60% and 90%, by weight of the sealant layer, of ethylene/vinyl acetate copolymer, and
- ii) between 10% and 40%, by weight of the sealant layer, of propylene homopolymer or propylene/ethylene copolymer (page 4, lines 10 to 13; page 9, lines 4 to 13, and page 11, lines 25 to 31).

**Grounds of Rejection to be reviewed on appeal**

The grounds of rejection to be reviewed on appeal (per the Office Action mailed August 26, 2005) are as follows:

1. Claims 23, and 25 to 28 stand rejected under 35 U.S.C. §102 (b) as being anticipated by Pockat et al. (US 5023121) as evidenced by Genske et al. (US 5407751).

2. Claim 29 stands rejected under 35 U.S.C. §103(a) as being unpatentable over Pockat et al. (US 5023121) as evidenced by Genske et al. (US 5407751) as applied to claims 23, and 25 to 28, further in view of Shibata et al. (US 4429079).

### Argument

1. Claims 23, and 25 to 28 are patentable under 35 U.S.C. §102 (b) and not anticipated by Pockat et al. (US 5023121) as evidenced by Genske et al. (US 5407751).

By way of background, it has now been found that if a food product is packaged in a VSP package made with certain microwaveable thermoplastic materials, it is possible to thaw and/or cook, or re-heat, the packaged product in a microwave oven without the need of removing, loosening or perforating the top lid before putting the package into the oven, without any risk of explosion, or of excessive stretching of the top web. The top web rises above the product, caused by the pressure of the vapor released by the product or by the sauce, oil, etc. accompanying the product. The top web is not overstretched, because a channel for the excess vapor to vent off is then created, between the top web and the bottom web or support member, from the packaged product to the outermost edge of the package. The top web remains raised over the product until the heating is done, allowing the steaming of the product, and then returns to its original position as soon as the heating is over. After microwaving is completed, the top web is peelably adhered to the bottom web or support member. This allows the top web to be easily peeled away.

On pages 2 and 3 of the Final Office Action mailed August 26, at paragraph 3, 4, and 5, claims 23 and 25 to 28 were rejected under 35 U.S.C. §102 (b) as being anticipated by Pockat et al. (US 5023121) as evidenced by Genske et al. (US 5407751).

Appellants respectfully traverse this rejection.

Paragraph 4 of the Office Action states in part (see last line of page 2) that

the claim recites “a sealant layer consisting essentially of” the EVA and the homopolymer/copolymer PP, the claim also recites “the bottom web of the vacuum skin package comprises”. Thus, the bottom web may *comprise* components in addition to the EVA and PP.

[emphasis in original]

Appellants point out that Pockat et al. teach that

The polybutene/polypropylene blend of *sealant layer 26* is commercially available from Shell Oil Company as Shell 1560, and comprises a melt blend of 80% PB with 20% PP. Of course, the polybutene, polypropylene, and third polymeric material of *sealing layer 26* may be separately provided as independent resins which are blended at substantially the same time prior to coextrusion.

(emphasis added)

Pockat et al. specifically refer to “sealant layer 26”. This layer can have a purchased blend of polybutene/polypropylene (available from Shell Oil Company as Shell 1560).

Alternatively, the polybutene, polypropylene, and a third polymeric material (examples given in the paragraph starting on line 34) can be separately provided. However, Pockat et al. specifically refer in this alternative to the polybutene, polypropylene, and third polymeric material of sealing layer 26. There is no indication that Pockat et al. are referring to separate layers. On the contrary, Pockat et al. clearly and repeatedly make reference to the sealant layer 26 shown in Figure 4 of the reference, whether in the first alternative (purchased blend and third polymeric material) or the second alternative (three independent resins).

This interpretation of the Pockat et al. reference is further reinforced, in column 6, by the discussion of the “three-component blend of the sealant layer 26”.

The issue here is whether Pockat et al. teach a bottom web comprising a sealant layer *consisting essentially of* a blend of

- i) between 60% and 90%, by weight of the sealant layer, of ethylene/vinyl acetate copolymer, and
- ii) between 10% and 40%, by weight of the sealant layer, of propylene homopolymer or propylene/ethylene copolymer.

It is the appellants’ position that Pockat et al. does not teach this recited sealant layer.

The appellants note that Genske et al. are relied on, with respect to the 102 rejection, only for their teaching of microwaveable materials and easy peel lid stock, issues not germane to the above discussion of the sealant layer. Genske et al. therefore add nothing further to this analysis. Genske et al. do not cure the lack of teaching, in the primary reference, to a bottom web comprising a sealant layer consisting essentially of a blend of

- i) between 60% and 90%, by weight of the sealant layer, of ethylene/vinyl acetate copolymer, and
- ii) between 10% and 40%, by weight of the sealant layer, of propylene homopolymer or propylene/ethylene copolymer.

On page 4 of the Final Office Action, at paragraph 10, it is stated that

[t]he Examiner agrees with Applicant's interpretation of Pockat et al. in that the sealant layer are separately provided and blended to form a *single* seal layer. However, claim 23 does recite a bottom web *comprises*, which is an open transitional phrase, and *consisting essentially of* does not exclude any other component, such as PB from being present.

[emphasis in original]

The Office Action then refers to and quotes a portion of MPEP 2111.03.

Appellants respectfully disagree with this analysis, because it intermixes two separate concepts. To be sure, claim 23 recites "wherein the bottom web of the vacuum skin package comprises a sealant layer . . . ". It is clear from the disclosure that the bottom web can be monolayer or multilayer in construction (see for example page 9 of the specification, lines 4 to 13). An example of a multilayer version of bottom web 30 is depicted on page 9, where the sealant layer 31 is shown, but layers 32 to 35 are also disclosed. Thus, the claim recites i.a. a bottom web that comprises, i.e. includes, a sealant layer with the recited formulation. Other layers can be present as well.

This language of claim 23 is further limited by the recitation of the sealant layer itself. The monolayer or multilayer bottom web 30 is characterized by a sealant layer that consists essentially of between 60% and 90% ethylene/vinyl acetate copolymer, and between 10% and 40%, by weight of the sealant layer, of propylene homopolymer or propylene/ethylene copolymer.

Thus, the open transitional phrase found in the beginning portion of this subparagraph of claim 23 refers to the construction of the overall bottom web 30. This should not be confused with, nor color, the specific recitation of the sealant layer in "consisting essentially of " format. Paragraph 10 (and the latter part of Paragraph 4 quoted earlier) of the Office Action appear to intermix the open language at one part of claim 23 with the more limiting language with respect to the sealant layer, to draw the conclusion that "consisting essentially of " does not exclude any other component, such as PB from being pre-

sent. Polybutylene could in fact be optionally included in some layer or layers of a multi-layer version of bottom web, consistent with the open ended language of claim 23 with respect to the overall construction of the bottom web. On the other hand, considering the more limiting language of the sealant layer, any significant amount of polybutene in the sealant layer can be reasonably expected to materially affect the basic and novel characteristics applicant's invention, because it can be reasonably expected to materially affect the nature of the bond between the sealant layer of the top web and the sealant layer of the bottom web. The formulation of the sealant layers of the top and bottom webs of the present invention must be carefully chosen to insure package integrity (i.e. an adequate seal between the top and bottom webs) before microwaving; to insure that during microwaving, the top web will rise above the product, without overstretching, by the creation of a channel for the excess vapor to vent off between the top web and the bottom web or support member; and to insure that after microwaving is completed, the top web will be peelably adhered to the bottom web or support member. Pockat et al. describe at columns 5 and 6 at least 6% polybutene (column 6, lines 19 to 20) in their sealant composition. Examples 1 to 10 of the reference were made with a polybutene/polypropylene blend, for their sealant layer 26, commercially available from Shell Oil Company as Shell 1560, and comprising a melt blend of 80% PB with 20% PP. The minimum amount of polybutene present in the sealant layer of these examples is therefore taught to be about 6.4%.

In summary, appellants respectfully submit that claims 23, and 25 to 28 are not anticipated by Pockat et al. (US 5023121) as evidenced by Genske et al. (US 5407751).

2. Claim 29 is patentable under 35 U.S.C. §103(a) over Pockat et al. (US 5023121) as evidenced by Genske et al. (US 5407751) as applied to claims 23, and 25 to 28, further in view of Shibata et al. (US 4429079).

Appellants rely on the above remarks with respect to claims 23, and 25 to 28.

Appellants respectfully ask the Board to reverse the finding of the Office Action of August 26, 2005, and to allow claims 23, and 25 to 29.

### Claims Appendix

23. A microwaveable vacuum skin package comprising:
- a) a support member having an upper surface and a lower surface;
  - b) a bottom web having an upper surface and a lower surface, the lower surface of the bottom web being adhered to the upper surface of the support member;
  - c) a food product disposed on the upper surface of the bottom web; and
  - d) a top web disposed on the food product;

wherein the top web of the vacuum skin package is draped over the food product, by a vacuum skin packaging process, such that the top web substantially conforms to the shape of the food product and a vacuum skin package is thereby produced;

wherein the top web of the vacuum skin package is sealed at its lower surface to the upper surface of the bottom web to form a seal at a location outside the periphery of the food product;

wherein the top web of the vacuum skin package comprises a sealant layer comprising an ethylene/alpha olefin copolymer; and

wherein the bottom web of the vacuum skin package comprises a sealant layer consisting essentially of a blend of

- i) between 60% and 90%, by weight of the sealant layer, of ethylene/vinyl acetate copolymer, and
- ii) between 10% and 40%, by weight of the sealant layer, of propylene homopolymer or propylene/ethylene copolymer.

25. The microwaveable vacuum skin package of claim 23 wherein the bottom web of the vacuum skin package comprises a single sealant layer adapted to be adhered to the sealant layer of the top web.

26. The microwaveable vacuum skin package of claim 23 wherein the support member comprises a material selected from the group consisting of polypropylene, polystyrene, polyamide, 1,4- polymethylpentene, and crystallized polyethylene terephthalate.

27. The microwaveable package of claim 23 wherein the top web of the vacuum skin package comprises:

- a) a sealant layer comprising an ethylene/alpha-olefin copolymer; and
- b) an oxygen barrier layer comprising a polymer selected from the group consisting of ethylene/vinyl alcohol copolymer, vinylidene chloride copolymer, polyamide, and polyester.

28. The microwaveable package of claim 23 wherein the bottom web of the vacuum skin package comprises:

- a) a sealant layer comprising a blend of:
  - i) between 60% and 90%, by weight of the sealant layer, of ethylene/vinyl acetate copolymer, and
  - ii) between 10% and 40%, by weight of the sealant layer, of propylene homopolymer or propylene/ethylene copolymer; and
- b) an oxygen barrier layer comprising a polymer selected from the group consisting of ethylene/vinyl alcohol copolymer, vinylidene chloride copolymer, polyamide, and polyester.

29. The microwaveable package of claim 23 wherein the ethylene/alpha-olefin copolymer comprises ethylene/.1-octene copolymer.

**Evidence Appendix**

No evidence described in 37 CFR §41.37(ix) was submitted by appellants or entered by the Examiner.

**Related Proceedings Appendix**

There are no other appeals, interferences or judicial proceedings known to appellants, appellants' legal representative, or Assignee which may be related to, directly affect, be directly affected by, or have a bearing on the Board's decision in the pending appeal.